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**June 15, 2004**
**DEPARTMENT OF ENERGY**
**OFFICE OF HEARINGS AND APPEALS**

***Appeal***

**Name of Case:** **Worker Appeal**

**Date of Filing:** **May 3, 2004**

**Case No.:** **TIA-0095**

**XXXXXXXXXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.**

## *I. Background*

**The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.**

**This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to a toxic substance at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/**

**Part D establishes a DOE process through which independent Physician Panels consider whether exposure to a toxic substance at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a Physician Panel issues a determination favorable to**

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**1/** ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.
The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the worker asserted that from 1963 through October 1967 he was an instrument mechanic in a fabrication shop in the K-25 Building and elsewhere at the DOE site in Oak Ridge, TN. Thereafter, through 1993, he was an electrician at the Y-12 Plant and in other areas of the Oak Ridge site. He claims he is suffering from the following conditions: a spot on the lungs; a blood clot to the brain; breathing problems; and loss of hearing. The applicant believes that exposure to radiation, beryllium, mercury and other contaminants in the workplace caused these illnesses.

The Physician Panel issued a unanimous negative determination on this claim. The Panel found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

In considering the worker's "spot on the lungs," the Physician Panel found that the applicant has a lung nodule that is an "isolated lesion." However, the Panel also determined that chest films and a

CT scan show no evidence of asbestos or other fibrotic disease that might be associated with the nodule. The Panel indicated that the individual had a negative test for beryllium sensitivity, and that the worker has "essentially normal" pulmonary function. The Panel noted that the applicant's "40 pack-year" smoking history "is sufficient to place [him] at risk, should the nodule should turn out to be malignant." Accordingly, the Panel came to a negative determination concerning the individual's spot on the lungs. The Panel gave the same reasons for its negative determination regarding the applicant's claimed breathing problems. With respect to the applicant's claim of a blood clot to the brain, the Panel found "no exposure documented that is plausibly associated with embolic disease." In its report, the Panel did not consider the applicant's claim of hearing loss.

## *II. Analysis*

The applicant seeks review of the Panel's determination.

With respect to the lung spot, the applicant claims that the Panel has not proven, through a biopsy or otherwise, that the condition is not due to toxic exposure at the Y-12 plant. He insists that his smoking is not sufficient to cause this condition. He states that he only smoked "in his later years," and that the true cause of his lung illness is exposure to toxic substances at the K-25 and Y-12 plants. The applicant makes a similar claim with respect to his breathing problems, emphasizing that he was exposed to mercury, asbestos and other toxic chemicals at the K-25 and Y-12 plants.

The applicant misstates the standard. In Part D cases, the Panel determines whether it is at least as likely as not that an illness is related to exposure to a toxic substance at a DOE site. 67 Fed. Reg. 52,841 at 52,842 (August 14, 2002). Thus, the Physician Panel is not expected to demonstrate that the illness is not related to such exposure. In this case, I see no evidence in the record suggesting that the lung conditions about which the applicant complains are related to toxic exposure at the DOE site. The Physician Panel found that his pulmonary function was "essentially normal," and that there was no evidence of asbestos or fibrotic disease that might be associated with respiratory disease. Nor is there any indication that the nodule is malignant. A radiology report of December 17, 2001 indicates that the applicant has "no nodules that are suspicious of lung cancer." Record at 29. The applicant has pointed to no evidence in the record that contradicts the Panel's determination, and I see none.

The applicant's claim that the Panel erred in its assertion regarding his smoking habit is of no avail. As an initial matter, as discussed above, the Panel determined, using the correct standard, that the applicant is not suffering from any lung illness related to toxic exposure at a DOE site. The fact that the Panel may have suggested that smoking could be the cause of the worker's lung conditions does not indicate any error in its determination. Moreover, the worker's assertion that he did not begin smoking "until his later years" is not borne out by the record in this case. For example, a pulmonary history report dated July 2, 1979, indicates that the applicant had been smoking more than 2 packs of cigarettes per day for 13 years. Record at 319. 2/ In any event, as I stated above, there is no evidence in the record to indicate that the Panel's decision concerning the worker's lung conditions was in error.

With respect to the blood clot to the brain, the worker again asserts that the Panel cannot disprove that this condition was caused by exposure to a toxic substance at a DOE site. As I stated above, the applicant misstates the standard. I find that the Panel applied the correct standard, and see no Panel error.

The applicant points out that the Panel failed to include a determination regarding his hearing loss. This issue can be disposed of summarily, without the need for any Panel involvement. There is evidence that the individual has sustained a hearing loss. However, the results of a physical examination of January 8, 2002, noted that the applicant's "abnormal hearing test can be caused by a variety of factors, including noise exposure and aging." The report went on to indicate, "given your noise exposure at the K-25 Gaseous Diffusion Plant . . . it is likely that occupational noise exposure contributed to your hearing loss." Record at 28.

As indicated above, proceedings under Part D of the EEOICPA cover workers who were exposed to a toxic substance during the course of employment at a DOE facility. 10 C.F.R. § 852.1(b). According to the regulations, toxic substance means "any material that has the potential to cause illness or death because of its radioactive, chemical or biological nature." 10 C.F.R. § 852.2. Noise does not

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2/ While the worker's assertions regarding his smoking habits are discrepant, his smoking habits, as set out in the record, indicate a long history of tobacco use, and efforts to quit. *E.g.,* Record at 321.

fall within any of these three categories of toxins. Noise does not fit "comfortably" within the ordinary meaning of "toxic substance." 67 Fed. Reg. 52,841, 52,843. Thus, even though the Physician Panel report did not refer to the individual's hearing loss, there is no need to remand this matter for additional review. I find as a matter of law that there is no basis for any further consideration of this issue.

As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and there is no basis for concluding that the Panel's determination was incorrect.

In sum, the applicant has not demonstrated any deficiency or error in the Panel's determination. Consequently, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

**IT IS THEREFORE ORDERED THAT:**

(1) The Appeal filed in Worker Advocacy Case No. TIA-0095 be, and hereby is, denied.

(2) This is a final Order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

**Date:** June 15, 2004